Filed 11/7/19 P. v. Herrera CA6

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JULIO JAVIER HERRERA,<br><br>Defendant and Appellant. | H044475<br>(Santa Clara County<br>Super. Ct. No. C1492968) |

A jury convicted appellant Julio Javier Herrera of false imprisonment, assault by means of force likely to produce great bodily injury, and misdemeanor contempt of court for violating a protective order. The false imprisonment and assault convictions resulted from a domestic violence incident. The contempt conviction resulted from Herrera's contact with the victim about one year after the incident. The trial court sentenced Herrera to six years in prison.

On appeal, Herrera claims that the trial court erred in three ways: by precluding cross-examination of the victim regarding her intent to apply for immigration benefits, by denying Herrera's request for a continuance to present expert testimony, and by admitting evidence of a prior inconsistent statement the victim made to police. Related to his claim about the denial of a continuance, Herrera contends that his defense counsel was prejudicially ineffective for failing to timely prepare and present a defense expert to rebut

the prosecution's evidence. In addition, Herrera claims that there was insufficient evidence to support the conviction for assault by means of force likely to produce great bodily injury. Finally, Herrera argues that the cumulative effect of all the alleged errors requires a reversal of the judgment.

For the reasons stated below, we reject Herrera's claims and affirm the judgment.[1]

## I. FACTS AND PROCEDURAL BACKGROUND

*A. Procedural Background*

In November 2015, the Santa Clara County District Attorney filed an information charging Herrera with felony false imprisonment effected by violence, menace, fraud or deceit (Pen. Code, § 236-237;[2] count 1); assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4); count 2); and misdemeanor contempt of court for violation of a protective or stay-away court order (§ 166, subd. (c)(1); count 3). The information further alleged that Herrera had suffered a prior strike conviction for a violent or serious felony (§§ 667, subds. (b)-(i), 1170.12) and two prior convictions resulting in prison terms (§ 667.5, subd. (b)).

In April 2016, a jury heard evidence and found Herrera guilty as charged. After a bench trial, the trial court entered true findings on the prior strike and prison prior allegations.

The trial court sentenced Herrera to six years in prison: a mitigated term of two years on count 2, which was doubled pursuant to section 667; 32 months on count 1 to be served concurrently with count 2; and consecutive terms of one year for each of the prison priors. The trial court also sentenced Herrera to 90 days in jail on count 3 to be

[1] Herrera's appellate counsel has filed a petition for writ of habeas corpus and a supplemental petition for writ of habeas corpus (H046532). In addition Herrera, representing himself, has filed a petition for writ of habeas corpus (H046919). This court ordered that these petitions would be considered with this appeal, and we have disposed of them by separate orders filed this day. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

[2] Unspecified statutory references are to the Penal Code.

served concurrently with the other counts. The trial court ordered payment of various fines and fees.

*B. Trial Evidence*

Herrera and Janeth C.[3] had dated for about three months before the September 11, 2014 incident that led to Herrera's prosecution for false imprisonment and assault. Earlier in their relationship, Herrera had grabbed Janeth's cellphone and smashed it after Janeth was offered entry into a nightclub but Herrera was not. In addition, about one week before the September 11 incident, Herrera had told Janeth "not to play him for a fool or else he was going to slap [her]."

On the morning of September 11, Herrera visited Janeth at the room she rented in a house in San Jose. As Janeth sat on her futon bed, Herrera grabbed her cellphone off of a dresser and began "scrolling" through it. Janeth believed Herrera was looking for proof that she had been talking to or seeing someone else. Herrera became upset about Janeth having called a friend "sexy" in a text message. Herrera took his shirt off and directed Janeth to stand in front of him. Herrera slapped Janeth on her right cheek, causing her head to turn toward her left shoulder. Although the slap did not hurt, Janeth was "shocked" and shaken by it. As she sat back down on her bed, Herrera kicked her thigh.

Herrera kneeled over Janeth, grabbed her neck with his left hand, pushed her down, and put the "phone in [her] face," telling her to look at it. Herrera applied pressure to both sides of Janeth's neck. Janeth did not feel the pressure or any pain in the moment, but she knew there was pressure "because there was soreness after." Janeth had difficulty breathing for a few seconds while Herrera's hand was around her neck, but she did not gasp for air or get dizzy. Janeth tried to speak but was unable to and made a "gargling

[3] To protect her privacy, we first refer to the victim by her first name and the first initial of her last name and, in the rest of the opinion, by her first name only. (Cal. Rules of Court, rule 8.90(b)(4).)

noise." Herrera had his hand around Janeth's neck for "probably, like, five seconds" but "[i]t could have been longer. It felt pretty fast."

San Jose Police Officer Jeffrey Yates testified about statements Janeth made to him on the night of the incident. Janeth told Officer Yates that Herrera had his hand on her throat area with a "pretty strong" grip for approximately 10 seconds, and she was feeling pain in the area of her face and throat. Although she did not lose consciousness, Janeth "did like gasp and shit." Yates did not that evening observe petechiae, any marks or redness on Janeth's neck, or anything affecting Janeth's speech. The neck-grabbing incident from the morning of September 11 formed the basis for the charge in count 2, assault by means of force likely to produce great bodily injury.

After Herrera let go of Janeth's neck, she sat up. Herrera grabbed a Subway sandwich he had brought and "smash[ed] it in [her] face." Janeth felt that she needed to get out of the room; she was afraid of what Herrera might do next. When Herrera went to the bathroom, Janeth ran from the house to her neighbor's yard and screamed " 'help.' " Herrera left but returned about 45 minutes later and told Janeth something like "don't play him for a fool."

Janeth left the house for about three or four hours. When she returned home around noon, Herrera was there hanging out with her housemate Anita's boyfriend. Janeth ignored Herrera but socialized and had a few drinks with her housemates and neighbors outside the house until nightfall. As everyone left for the night, Janeth told Herrera to go home. Janeth went to her bedroom, locked the door, and got ready for bed. Herrera knocked on Janeth's door, asked to be let in, and said he was going to knock down the door. Janeth refused to let him in. One of Janeth's housemates, Rosa, heard the "commotion" down the hall from her room. Rosa peeked out her door and saw Herrera. Rosa heard Herrera and Janeth yelling. Herrera asked Janeth to open her door. Rosa called the police at the request of her stepfather, who owned the house.

Janeth thought she was going to be trapped with Herrera in her bedroom again, so she jumped out the window. Herrera exited the house. Janeth jumped over a fence and ran. Herrera caught up to Janeth, put her in a "side choke hold" for about four to five seconds, and pulled her away from the house and across the street. She did not feel any pressure on her head or neck when in the chokehold and she was able to get out of the hold "pretty quick" using moves she learned while studying Tae Kwon Do. Janeth bit Herrera on his arm while in the chokehold and accidentally bit the inside of her mouth, causing it to bleed.

Herrera wrapped his arms around Janeth's body and pulled her further across the street. They ended up beside a parked car a couple of houses away from Janeth's house. Janeth told Herrera to go home and let her go, but he said no.[4] Herrera placed his arms around Janeth's waist so she could not move; she was "sort of, like, caged in."

When she heard sirens, Janeth told Herrera that he needed to leave. They began "walking away, like, nothing was going on." After the police arrived, Janeth ran toward Officer Yates because she was scared and did not want to be alone with Herrera. Janeth was not wearing shoes, and her left forearm and shirt had dried blood on them. She had a small cut inside her mouth and her shirt was ripped on the side. Janeth thought the blood on her shirt was from the cut in her mouth. She did not know how her shirt got ripped, but she thought it happened because of the chokehold. The sides of Janeth's neck were "pretty sore for the next couple days" and it was hard for her to turn her neck. This incident in the evening of September 11 was the basis for the charge in count 1, felony false imprisonment.

Five days after the incidents on September 11, 2014, the Santa Clara County Superior Court issued a criminal protective order prohibiting Herrera from having any contact with Janeth. About one year later, on September 13, 2015, Herrera spoke to

[4] Rosa testified that she had heard Janeth say " 'let me go' " and saw Herrera "hugging" Janeth about three houses down the street.

Janeth over the phone and sent her text messages. Janeth called 911 and reported the contact to police. This contact was the basis for the charge in count 3, misdemeanor contempt of court.

On cross-examination of Janeth, the defense introduced a notarized letter that Janeth had signed under penalty of perjury on December 4, 2014. In it, Janeth said that Herrera "never assaulted and/or battered [her] in relation to this case or otherwise." She explained that the statements she "provided to law enforcement on September 11, 2014 . . . were made under duress." Janeth said that she had previously been threatened by her landlord with eviction if Herrera visited her. She said that her statements to law enforcement were made because she "needed an excuse" to avoid eviction.

At trial in April 2016, Janeth testified that her statement in the letter that Herrera never assaulted or battered her was not true. She also testified that the statement about talking to police because she needed an excuse to avoid eviction was false.[5] Janeth did not write the letter. Herrera gave the letter to Janeth and told her to sign it and get her signature notarized. Janeth acknowledged, however, that she told defense counsel previously that Herrera was not involved in the preparation or notarization of the letter. Janeth signed the letter because she wanted to "help" Herrera. During trial, Janeth received use immunity from the district attorney for her testimony about the letter.

Janeth testified further on cross-examination that, a few days after the September 11 incident, she learned she was pregnant with Herrera's child. Around the same time, she moved out of the house, and she and Herrera ended their dating relationship.[6] Their son was born in May 2015, and Janeth asked Herrera for money a couple of times. In a February 2016 text-message exchange that followed a phone conversation, Janeth

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[5] Janeth admitted, however, that her landlord had once told her that it was " 'not okay' " for Herrera to visit her at the house.

[6] On redirect examination, Janeth explained that she moved out shortly after the incident because she "just was a little paranoid" and "thought [Herrera] was going to show up at [the house] again."

threatened to file a child support action if Herrera did not give her $250 monthly. During the text exchange, Herrera asked Janeth if she was threatening to testify against him if he did not give her money. Janeth responded to Herrera's questions with "I already am" and "It's a warning." Janeth testified at trial that she was referring to child support proceedings and not the criminal case when she responded, but she admitted that she made no attempt to clarify her intent during the text exchange. When Herrera texted, "I don't mind you filing for child support. It's just why must you threaten me and threaten my liberty," Janeth responded, "Fuck you that's why." By the time of her trial testimony, Janeth had not filed an action for child support and Herrera had not given Janeth the money she had requested.

A forensic nurse examiner, Angela Rodriguez, testified for the prosecution as an expert in strangulation. Rodriguez explained that strangulation involves the application of external pressure on the neck causing the internal structures to compress or collapse. Rodriguez opined that "it takes about 4.4 pounds of pressure to completely collapse [a jugular vein] and impede blood flow" from the head. If the jugular veins on both sides of the neck are occluded, pressure increases in the head and petechial hemorrhages or inner cranial bleeds may occur. A person whose jugular veins are occluded on both sides for about 10 seconds will lose consciousness.

Rodriguez opined that "it would take about 11 pounds of pressure to actually occlude our carotid vein [*sic*]." When the carotid arteries (which supply blood to the head) are compressed, the jugular veins usually are compressed as well. The compression stops blood flow to and from the head, including the brain. This circumstance causes a risk of blood clots, and the lack of oxygen can cause ischemia or stroke-like symptoms. As with the jugular veins, occlusion of the carotid arteries with 11 pounds of pressure for 10 seconds can cause a loss of consciousness.

Rodriguez explained that "about 33 pounds of pressure [is needed] to completely collapse the trachea." A collapsed trachea "can't really rebound at all. [The injured

person] would need urgent medical attention and an airway." "[S]omeplace in between that 11 pounds and 33 pounds . . . will still do damage to the other structures within the neck causing . . . swelling of the soft tissues around it and even potential fractures . . . around the thyroid cartilage . . . . So it can cause additional pain, swelling, difficulty breathing, that kind of case can happen internally."

Rodriguez stated the carotid arteries and jugular veins can be compressed by one-handed manual strangulation, depending on the size of the hand and neck. An average male can squeeze his hand closed with "about anywhere from 103 to 108 pounds of pressure."

Rodriguez explained that "[b]ruises will not fully come to light until about 24 to 48 hours after an event has occurred." "50 percent of strangulation patients really show no injury at all. 35 percent will only actually show a very minor amount of injury. And the last 15 percent are that typical person that everybody would think of on TV that has multiple injuries and looks pretty bad off." Strangulation patients who do not have visible injuries may nevertheless have a weakened voice, painful swallowing, compromised range of neck motion, and internal swelling.

In response to hypothetical questions by the prosecution, Rodriguez testified that if a person reported difficulty breathing while being subjected to one-handed strangulation, she or he could have experienced hyperventilation caused by the traumatic experience or internal damage to her or his airway. A person who reported having had to gasp for air or gargling during strangulation would mainly have experienced compression to her or his airway and esophagus. This consequence "would be something most likely [to result] in between that 11 pounds of pressure and 33 pounds of pressure." An inability to speak during strangulation could result from the person being "already out of air as they're gasping for air" or "hyperventilating" during the struggle. Difficulty moving one's neck after strangulation indicates "some type of soft tissue injury or a muscular injury to the

neck." Other symptoms that can result from strangulation are loss of bladder or bowel control, dizziness, and vomiting.

On cross-examination, Rodriguez was impeached with her prior testimony from another case in which she stated that, in her expert experience, "petechial hemorrhages have been there in probably about 70 percent" of the cases. Rodriguez testified that "petechial hemorrhaging is the most common type of injuries that [she] would see in a strangulation case . . . . But to give . . . an estimate, 50 to 70 percent would seem accurate." Rodriguez acknowledged that a person who had been slapped one time with force sufficient to cause her head to snap to the side could experience neck pain due to the slap for several days.

The defense did not present any witnesses.

## II. DISCUSSION

Herrera claims that the trial court erroneously precluded his counsel from cross-examining Janeth about her intent to apply for certain immigration benefits, violated his constitutional right to present a defense by denying a request for a continuance to present expert testimony, and improperly admitted evidence of Janeth's statement to police that the strangulation lasted about 10 seconds as a prior inconsistent statement. Herrera also contends that his counsel was prejudicially ineffective for failing to timely prepare and present an expert to rebut the prosecution's expert on strangulation. In addition, Herrera claims that the evidence was insufficient to support the conviction for count 2, assault under section 245, subdivision (a)(4). Finally, Herrera asserts that the cumulative effect of all the alleged errors requires a reversal of the judgment.

### A. *Cross-Examination on Immigration Matters*

Herrera argues that the trial court committed prejudicial constitutional error by preventing him from cross-examining Janeth about her eligibility and intent to apply for a

U-Visa.[7] Specifically, Herrera contends that the proposed "line of questioning was clearly relevant to show motive and/or bias, and thus relevant to her credibility." Herrera challenges the trial court's "questioning [of] the relevance because it was 'speculative' " and argues that the probative value of the evidence outweighed its prejudicial effect. The Attorney General counters that Herrera's claim is forfeited because he failed to make an adequate offer of proof about what Janeth would have said regarding a U-Visa. In addition, the Attorney General argues that the claim lacks merit and, if the trial court erred, the error was not prejudicial.

For the reasons discussed below, we conclude no error occurred when the trial court precluded the proposed cross-examination.

1. Procedural Background

Prior to trial, defense counsel said he "might seek a brief five-minute [Evidence Code section] 402 hearing with the complaining witness to ask just generally whether she has gone through [the U-Visa] process; if so, what is the status of it; and, if not, what is her current understanding of that, and was she informed by the police officer." The prosecutor said the district attorney's records did not indicate that Janeth had sought a U-Visa. The trial court asked defense counsel to draft a formal request for a hearing on the issue and said it would rule the next morning.

At the end of the next day, the trial court noted it had received an e-mail from defense counsel requesting "the Court to look into the possibility of addressing U visas with the alleged victim in this matter." The trial court said the parties had a "fairly thorough conversation about the Court's indicated [ruling in chambers]," at which time the court "indicated to [defense counsel] and [the prosecutor] that if they wished to speak with the alleged victim about that particular issue, this would be the time to do so and, if

[7] A U-Visa confers certain immigration benefits to eligible undocumented crime victims who assist law enforcement with an investigation or prosecution. (See 8 U.S.C. §§ 1101(a)(15)(U), 1184(p)(6); 8 C.F.R. § 245.24(b) (2013); 8 C.F.R. § 214.14 (2013).)

there's any additional information, to address it tomorrow so that we can proceed from there." Defense counsel said that he had not had any opportunity to talk to Janeth and would "try to reach her tonight, if possible."

Three days later, during a recess in defense counsel's cross-examination of Janeth, defense counsel made "an offer of proof about why we believe it's necessary under the Sixth Amendment to allow questioning of the alleged victim in the case regarding, number one, her immigration status and, number two, both the potential issue of U visa advisement since that issue has been brought up in this case." Defense counsel said he had "information to believe" that Janeth was "a lawful resident with a green card."[8] Counsel asserted that Janeth's immigration status was "less prejudicial for the jury to hear" and she "would have a different interest in making statements to law enforcement" than a U.S. citizen would.

The prosecutor argued that any testimony about immigration matters is irrelevant and more prejudicial than probative under Evidence Code section 352.[9] The prosecutor said that "ask[ing] the jury to consider something that we're uncertain about is prejudicial to the People's case and creates a trial within a trial and really confuse[s] the issues about what's going on." In addition, the prosecutor confirmed that his office was not aware that Janeth had applied for a U-Visa. The prosecutor did not state whether he otherwise had any knowledge of Janeth's immigration status.

Defense counsel argued further that his "ability to make a better offer of proof in regard to the U visa is limited in this case." Counsel said the district attorney's office

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[8] At a post-trial hearing on a motion Herrera filed under *People v. Marsden* (1970) 2 Cal.3d 118, Herrera said that he was "personally aware . . . that [Janeth] does not" have a green card. No one involved in the trial asserted to the trial court during trial that he or she had personal knowledge that Janeth did not possess a green card or U.S. citizenship.

[9] Evidence Code section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

might not be aware that Janeth applied for a U-Visa because she could have applied directly to the federal government or through a consulate. Counsel said that the U-Visa "would allow [Janeth] to obtain, somewhere down the line, enhanced lawful status from that which she already has." In addition, "questioning in this area" would be "probative" because Janeth might apply for citizenship through her son, in which case, "conflicts with law enforcement or issues that come up in legal settings . . . can affect that process" and that is something a person "in her situation may or may not consider." Finally, defense counsel noted that Janeth's appointed counsel "brought up the U visa conversation independently" during a conversation, but defense counsel did not know whether the topic of a U-Visa had "been discussed with [Janeth]." Defense counsel concluded, "I won't know and I can't make a better offer of proof as to what context or what steps have been made to go down -- go that direction. But to the extent that they have been done, I do think that would be highly relevant for the jury, especially in the context where the defense is primarily relying on changed story or inconsistencies in different stories over time."

The trial court denied the request to cross-examine Janeth on the subject of her immigration status under constitutional provisions and Evidence Code Section 352, finding that "the probative value [of the proposed inquiry] is not substantially outweighed by the prejudicial effect," (*sic*) and the questioning would require an undue consumption of time because "having us go into the issue of immigration would . . . need and necessitate someone explaining what, in fact, the consequences would be to the jury." When ruling, the trial court noted the propriety of cross-examination on issues of motive and bias and said that it was mindful of Herrera's constitutional rights "in terms of cross-examination."

The trial court explained that "it is highly speculative at this point as to whether this witness is testifying for any immigration consequences or benefits. I think assuming as much because she is a legal resident or assuming as much because if she were to be an

undocumented person in this state would be, frankly, in this Court's mind inappropriate and, again, highly speculative." The court opined that questioning an undocumented person or a legal resident, "as a matter of course," about her or his immigration status as related to bias or motive "would create a chilling effect."

The court found further that "this case [is] distinct in some ways in that this is not an incident where the witness reported this incident to the police maybe three days later or a week later or a month later wherein it might be assumed that she received some information in the interim regarding immigration and now she's going to try to benefit from that by working with law enforcement." Thus, there was no "necessary basis to even assume or presume that this witness was in a position to be moving in the direction of testimony for that purpose." Finally, the trial court explained that "[t]here's also a significant risk" that "the issue of [Janeth's] immigration status might affect in [the jurors'] mind[s] the credibility of her statement unnecessarily and inappropriately."

2. Analysis

All relevant evidence is admissible except as otherwise provided by statute. (Evid. Code, §§ 350, 351). Relevant evidence includes "evidence relevant to the credibility of a witness." (Evid. Code § 210; see also Evid. Code § 780, subd. (f).)

"As a general matter, a defendant is entitled to explore whether a witness has been offered any inducements or expects any benefits for his or her testimony, as such evidence is suggestive of bias." (*People v. Brown* (2003) 31 Cal.4th 518, 544.) However, a defendant's "right to cross-examination is not a matter of 'absolute right.' Although . . . '[c]ross-examination to test the credibility of a prosecuting witness in a criminal case should be given wide latitude' [citation], such latitude does not 'prevent the trial court from imposing reasonable limits on defense counsel's inquiry based on concerns about harassment, confusion of the issues, or relevance' [citation]. Moreover, reliance on Evidence Code section 352 to exclude evidence of marginal impeachment

value that would entail the undue consumption of time generally does not contravene a defendant's constitutional rights to confrontation and cross-examination." (*Id*. at p. 545.)

"The trial court retains wide latitude to restrict repetitive, prejudicial, confusing, or marginally relevant cross-examination. Unless the defendant can show that the prohibited cross-examination would have created a significantly different impression of the witness's credibility, the trial court's exercise of discretion to restrict cross-examination does not violate the constitutional right of confrontation." (*People v. Sánchez* (2016) 63 Cal.4th 411, 450–451 [citing, among other cases, *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680].)

Further, " '[T]he latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' " (*People v. Ayala* (2000) 23 Cal.4th 225, 301.) " 'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.' " (*People v. Blacksher* (2011) 52 Cal.4th 769, 821.) Thus, "[a]lthough the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right." (*People v. Cunningham* (2001) 25 Cal.4th 926, 999 (*Cunningham*).)

Appellate courts generally apply the de novo or independent standard of review to claims that implicate a defendant's constitutional right to confrontation. (*People v. Seijas* (2005) 36 Cal.4th 291, 304.) A trial court's evidentiary ruling under Evidence Code section 352, on the other hand, is reviewed for abuse of discretion. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1130 (*Mungia*); see also *People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.)

Here, under either standard, we discern no error in the trial court's preclusion of questioning about Janeth's immigration status and potential immigration benefits.[10] The probative value of the proposed cross-examination was marginal. Defense counsel informed the trial court that Janeth was a legal permanent resident of the United States, which meant that she was allowed to live and work permanently in the country. (See 8 U.S.C. §§ 1101(a)(13)(C), 1101(a)(20).) Thus, Janeth had no need for the temporary immigration benefits conferred by a U-Visa. (See 8 U.S.C. §§ 1101(a)(15)(U), 1184(p)(6); 8 C.F.R. § 245.24(b) (2013); 8 C.F.R. § 214.14 (2013).) Because Janeth would not have profited from these temporary immigration benefits, questions about them would have had little probative force.

In his reply brief, Herrera argues that "the issue [before the trial court] turned on [Janeth's] subjective belief about the benefits she might obtain by testifying; the exact nature of those benefits, or her actual eligibility, were immaterial." (Italics omitted.) Even if we accept Herrera's premise that the actual potential benefits are "immaterial" to the probative value of the proposed questioning, Herrera failed to provide the trial court with any information regarding Janeth's subjective belief about immigration benefits.

Herrera did not assert at trial that Janeth was aware of the U-Visa or any other immigration process related to her victimhood or that she engaged in any conduct that demonstrated an intent to pursue a U-Visa or any other immigration-related benefits before or after trial. Defense counsel also did not claim that he was unable to speak to Janeth about her immigration status or intentions. In fact, the record establishes that defense counsel spoke with Janeth about her notarized letter after counsel told the trial

[10] We reject the Attorney General's argument that Herrera forfeited his claim because he did not make an adequate offer of proof about Janeth's potential testimony. Herrera adequately explained the relevance of the proposed cross-examination to preserve his claim for appellate review, and the trial court ruled on the defense request under asserted constitutional principles and Evidence Code section 352. (See Evid. Code, § 354, subd. (c); *People v. Whitt* (1990) 51 Cal.3d 620, 648; *People v. Allen* (1986) 42 Cal.3d 1222, 1270 & fn. 31; *People v. Coleman* (1970) 8 Cal.App.3d 722, 729–731.)

court he would try to contact Janeth about the immigration matter and before he began his cross-examination of her. Further, as the trial court noted, the circumstances of the crime report did not suggest Janeth might have been trying to gain an immigration benefit from her interaction with law enforcement. The record does not show that Janeth had any beliefs about possible immigration benefits related to her status as a crime victim.

In contrast to its marginal relevance, the proposed questioning posed a substantial risk of undue prejudice, consumption of time, and confusion. As the trial court articulated, exploring Janeth's immigration status and any possible benefits could have unduly biased jurors against Janeth without providing any probative benefit. "[C]ases both in California and in multiple other jurisdictions have recognized the strong danger of prejudice attendant with the disclosure of a party's status as an undocumented immigrant." (*Velasquez v. Centrome, Inc.* (2015) 233 Cal.App.4th 1191, 1213.) In addition, immigration law is complex and would have undoubtedly taken time to explain to jurors in order for them to understand the basis for the defense's contention of bias. (See *Padilla v. Kentucky* (2010) 559 U.S. 356, 379 (conc. opn. of Alito, J.).) The trial court, therefore, reasonably weighed the consumption of time and confusion that would result from Herrera's proposed cross-examination and the legal explanations concerning immigration law.

Further, Herrera was not denied the right to confront and cross-examine Janeth. He vigorously challenged Janeth's testimony on cross-examination using the notarized letter and her text messages and highlighted inconsistencies in her statements about the charged crimes. The jurors were provided with ample information to evaluate Janeth's credibility, and any impeachment of her based on the supposed immigration benefits of her testimony would, at best, have been of marginal benefit.

In sum, the trial court appropriately exercised its discretion to prohibit defense counsel from cross-examining Janeth about immigration matters. The court properly weighed the potential for undue prejudice against any probative value and reasonably

declined to permit cross-examination on this collateral issue. We have also conducted an independent review of the trial court's ruling and find no violation of Herrera's confrontation or due process rights. For these reasons, the trial court did not err in its ruling under the Evidence Code or violate Herrera's constitutional rights to confrontation or due process.

B. *Continuance Request*

Herrera contends that the trial court erred by denying his midtrial request for a continuance to present expert testimony to rebut the prosecution's expert, Rodriguez.[11] Herrera argues that Rodriguez's interpretation and explanation of the evidence about Herrera's actions and Janeth's physical sensations were vital to the prosecution's case on the felony assault charge. Herrera asserts that Rodriguez's testimony was a "surprise" and denying defense counsel a "short continuance to consult with his expert, and to provide counter testimony" violated Herrera's constitutional right to a meaningful opportunity to present a complete defense. Herrera also argues that the denial of a continuance amounted to an abuse of discretion under state statutes and he was prejudiced by the denial. The Attorney General counters that Herrera forfeited at least a portion of his constitutional claim, and the trial court properly denied the continuance.

1. Background

More than a week before the presentation of evidence began, the prosecutor informed the defense of his intent to call Rodriguez as an expert witness on strangulation. The prosecutor subsequently explained in an in limine motion that Rodriguez's "testimony would includ[e] discussing what strangulation is, how it is different than [choking], what the common effects and symptoms of strangulation are, as well as potential injuries that can result from strangulation." The prosecutor specified that the act

[11] Herrera raises a related claim challenging the continuance denial in his accompanying petition for habeas corpus (H046532). We have summarily denied that claim in a separate order filed in that case.

alleged as assault in count 2 "is that [Herrera] strangled the victim with one hand for approximately 10 seconds resulting in difficulty breathing, shortness of breath, and soreness of the throat. The testimony of [Rodriguez] is relevant in that it will assist the jury in determining whether the force used in this case was likely to cause great bodily injury."

At a pretrial hearing held the week after the prosecutor disclosed his intention to call Rodriguez, the prosecutor reiterated that he anticipated "a majority of [Rodriguez's] testimony will be about general concepts of strangulation, explain to the jury what that is, how it's different than choking, how the internal system works, and what are some of the common symptoms and injuries from a strangulation."

When asked by the trial court if he planned to call any experts, defense counsel said he did not intend to call an expert and "[did] not have a rebuttal expert prepared at this point." Defense counsel explained that, although he had "a general idea what [Rodriguez] might testify to[,] [t]hat doesn't really provide me much basis to decide to call an expert myself." Counsel explained further that he believed Janeth's lack of injury was inconsistent with her reported strangulation and, thus, no prosecution expert was necessary. The trial court stated its expectation that the trial would proceed "in a timely, efficient manner," and cautioned counsel to begin making decisions and arrangements regarding potential witnesses because the trial would "proceed[] in an expeditious fashion." As for the trial schedule, the trial court said it would be unavailable after April 8, and the parties stated they anticipated the jury would be deliberating by then.

Six days later, on April 5, 2016, defense counsel mentioned the expected testimony of Rodriguez during his opening statement. Counsel explained that Rodriguez would "testify about how little force and effort is needed to strangle somebody" and strangulation might not result in injury to the victim.

The next day (April 6), defense counsel told the trial court and the prosecutor that he had "identified a doctor who is potentially available" to testify for the defense the

following afternoon. Counsel said that he had provided case materials to the defense expert "last night" and, "[d]epending on the opinions that are offered into evidence by the People through their nurse expert, I would potentially be seeking to call [the defense expert]." Defense counsel noted he had not received a report regarding Rodriguez's "generic testimony" but had sent photos to his expert and was "hoping to get an opinion about the general issue of whether someone can have no injuries but have been the victim of a strangulation." Defense counsel said his expert might not be called as a witness.

The trial court stated that it expected the prosecutor would conclude his evidence that day or the next morning, and the court would give the defense until the next morning to determine the evidence it wanted to present in its case. The trial court told defense counsel to have ready by the next day the names of the witnesses he intended to call and offers of proof about their testimony.

That afternoon, the trial court excused the jury early because defense counsel disclosed Janeth's notarized letter before beginning his cross-examination of her. The trial court arranged for Janeth to be appointed an attorney because of her possible commission of perjury and ordered that the parties reconvene the following day.

The next morning, April 7, the trial court ordered a hearing on Janeth's letter for later that day. Regarding the trial schedule, the court said that the trial likely would not be completed by April 8, as had been promised to the jury. The trial court reiterated its unavailability after April 8, and the parties agreed to continue the trial until April 18, if necessary. After the hearing on Janeth's letter, the trial court questioned the jurors about their availability during the week of April 18.[12]

On April 8, defense counsel cross-examined Janeth, and the prosecutor began but did not conclude his redirect examination. The trial court said it expected the prosecutor

[12] The trial court ultimately excused and replaced one juror due to the juror's future unavailability given the extended length of the trial. Herrera does not challenge on appeal the trial court's decision to replace the juror.

would present any remaining witnesses, including the prosecution expert, and would conclude his case on Monday, April 18. The court directed that, if defense counsel sought to present an expert, defense counsel should provide information to the prosecutor and be prepared on April 18 with an "offer of proof" regarding the expert's testimony. The court said further that defense counsel "[could] wait . . . until after the People have presented their expert to narrow or broaden the issue. But [defense counsel should] be prepared to have a name and contact for a person that you would be wishing to call in your case."

Defense counsel said he had provided the name of his expert to the prosecutor and had contacted the defense expert multiple times about his availability, including e-mailing him the previous night regarding the uncertain scope of Rodriguez's testimony and whether the expert would be called to testify on April 18. Defense counsel said further that, without a statement from Rodriguez about her impending testimony, he could not decide whether to call his expert in rebuttal and it was difficult to reserve and compensate his expert due to the uncertainty. Defense counsel suggested that he and the prosecutor discuss Rodriguez's testimony during the impending trial recess so that he could determine whether to call the proposed defense expert as a witness.

The trial court expressed its "understanding" from the prosecutor's offer of proof that Rodriguez had not conducted an evaluation of Janeth and would testify generally about strangulation and its potential effects. The court noted, however, that, because Rodriguez is an expert, the prosecutor could ask hypothetical questions "tethered to evidence that has been presented or testimony in this case that the expert could rely upon in making a conclusion."

Regarding the potential defense rebuttal, the trial court explained that defense counsel should "make sure . . . [to] have [a] conversation with [his expert] about what the potential testimony may be, such that, when you've heard the evidence or testimony, you can be prepared to respond as to what your expert would likely be able to testify to that is

relevant." The trial court cautioned defense counsel: "What I'm not comfortable with is [the] People putting on their witness at this point and then hearing from the defense that, well, we need a week or, you know, an extended period of time for the purpose of response. [¶] I certainly understand that witnesses, doctors in particular, are very difficult to wrangle because they have patients. They have other business. . . . [¶] But that is something that, because we have this week off, that's going to be on you, [defense counsel], to make sure you've had that conversation with the physician and make sure they understand they need to be available. . . . on Tuesday[, April 19,] . . . at the earliest. . . . but no later than . . . Wednesday morning to be ready to go. But certainly have your folks ready, I would say at this point, by Tuesday, and have them ready to testify. [¶] So that means if -- once you hear from the People's expert, you can have whatever conversation you need to have with your expert over Monday night so that on Tuesday morning when I turn to your case, you'll be ready to proceed with that witness. So I'm just indicating to you at this point what the Court's expectation is going to be with regard to the week of April 18th."

In response, defense counsel said he would make sure his expert was available to testify on Tuesday, April 19th. Defense counsel and the prosecutor discussed their understanding of the anticipated testimony of the prosecution expert. The prosecutor stated, among other topics, that he was "going to ask [Rodriguez] a hypothetical. If someone was strangled and had difficulty breathing, what does that mean to you based on your training and experience? What internally are the issues that have occurred? What about going forward[?]" The trial court told the prosecutor to "make sure the defense and the Court [are] aware of the area that [the prosecutor] would be eliciting from this particular witness," suggesting that the prosecutor have "a more detailed conversation with this witness as to what [he] expect[s] and want[s] her to testify to" and disclose that information to the defense.

The trial court explained further that "there needs to be a clear offer of proof from the People as to exactly what things you're going to be eliciting from [Rodriguez] so that the Court could make sure that they're even relevant for the purposes of this trial and/or appropriate for this trial. [¶] . . . But, I guess, I'm saying to you [and] what I'm saying to [defense counsel] is that the impetus is going to be on you as well to make sure that when we come back on Monday we're hitting the ground and we're not confused about what's expected on that day." The prosecutor responded, "I have a feeling [defense counsel] and I will be in contact next week." The trial court adjourned the trial to April 18.

After the one-week trial recess, Janeth completed her testimony on Monday, April 18. That afternoon, the prosecutor called Rodriguez to testify. Rodriguez testified about the potential effects of strangulation in relation to the amount of pressure applied. The prosecutor also asked Rodriguez hypothetical questions based on the trial evidence. Defense counsel objected to the hypothetical questioning. The trial court held an unreported conference at the bench on the objection and overruled the objection.

The parties later memorialized defense counsel's objection. Defense counsel said the hypothetical questions were improper because he believed, based on the prosecutor's prior representations, that Rodriguez would provide only "generic testimony regarding strangulation" and "[c]over the general concepts that there is a myth out there about whether or not you can have strangulation where there's no visible external injuries." Defense counsel said he had that information "reviewed by a doctor who provided [counsel] similar information about, yes, this is a possible phenomenon you can have."

Defense counsel explained that the "most concerning" statements by Rodriguez "involve speculating about how much pressure is used or needed to . . . produce different responses on the throat, specifically, and then the follow-up questions to that regarding pain to the side of the neck. [¶] Had I been provided notice of that, I would have probably looked at calling a rebuttal expert about those specific things and [to] talk about the different types of things you would expect to find."

Defense counsel explained further regarding potential rebuttal: "I . . . was not put on notice that this witness was going to be testifying about specific facts in this case and in the hypothetical format; meaning, as far as I know, she's never been asked any of these questions . . . [and] I've had no notice of what responses she's going to be giving. And that's my main area of concern. [¶] I have not contacted a doctor with those hypotheticals, because . . . that's not something I've been put on notice is going to be produced in this case. I also no longer have a doctor who is able to testify tomorrow. He informed me he's unavailable tomorrow." Counsel said he would request a continuance the next morning, and he did not know currently when his expert would be available.

The prosecutor responded that most of Rodriguez's testimony had been "generic [and] general." The prosecutor apologized "if [he] wasn't clear enough" about his intention to ask case-specific hypotheticals; he "thought the Court had said that hypotheticals are fine."

The trial court explained that it overruled defense counsel's objection to the hypothetical questions because expert testimony can properly include hypothetical questions rooted in the trial evidence, and that it previously "had mentioned with regard to any expert that was called by either side . . . that hypotheticals would be allowed."

Regarding the defense request for a continuance, the trial court said it had indicated before the trial recess that the defense case would begin on Tuesday [April 19]. In addition, the court explained that, "if the defense has an offer of proof that there is a witness that they believe would be able to testify with relevant evidence in this case with regard to any hypothetical, the Court would be willing to entertain that." When asked if he had anything more to add, defense counsel said no.

The next day, April 19, defense counsel said he was not ready to present a defense and requested a continuance to Monday, April 25, to present testimony by defense expert Dr. Kadeer Halimi, an emergency room doctor. Defense counsel explained that he had first contacted Dr. Halimi on April 1. Counsel had anticipated that a "main issue" in

Rodriguez's testimony would be "strangulation cases where there's no visible injuries." Counsel said he believed Dr. Halimi "would potentially testify to different percentages of cases that he sees [with no visible injuries]." Although Dr. Halimi had been prepared and was available to testify before the week-long trial recess, defense counsel did not hear back from Dr. Halimi after counsel sent him a summary of Rodriguez's expected testimony during the recess. Counsel learned that Dr. Halimi had been on vacation and also was not available to testify during the week of April 18 because of his work schedule. Counsel noted that the prosecutor said he would be unavailable during the week of April 25 and extending the trial to that week was not addressed with the jurors.

The court acknowledged that "the defense and the defendant should be afforded an opportunity to present a defense to the extent that they wish to do so," but explained it had discretion to exclude evidence. The court said it "[found] it somewhat speculative" whether the defense expert "would provide any additional relevant evidence . . . in light of what was covered" by Rodriguez regarding the percentage of strangulation cases that present with no visible injuries. The trial court also noted that defense counsel was on notice before the recess that any defense witnesses had to be available on April 19, and "if one expert was not available . . ., then obviously there should be attempts to contact other experts in the field." Regarding "the burden" of a continuance on witnesses and jurors and "whether justice will be accomplished or defeated by granting the motion," the court noted that the trial had gone well beyond the time estimate that had been promised to the jurors, and certain jurors indicated they would not be available after the week of April 18. Accordingly, the trial court denied the motion for a continuance.

2. Analysis

"Continuances shall be granted only upon a showing of good cause." (§ 1050, subd. (e).) "The granting or denial of a motion for a continuance in the midst of a trial traditionally rests within the sound discretion of the trial judge." (*People v. Laursen* (1972) 8 Cal.3d 192, 204.)

"The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked. [Citation.] [¶] Under this state law standard, discretion is abused only when the court exceeds the bounds of reason, all circumstances being considered. [Citation.] Moreover, the denial of a continuance may be so arbitrary as to deny due process. [Citation.] However, not every denial of a request for more time can be said to violate due process, even if the party seeking the continuance thereby fails to offer evidence. [Citation.] Although 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality [,] . . . [t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process.' [Citation.] Instead, '[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.' " *(People v. Beames* (2007) 40 Cal.4th 907, 920–921; see also *Ungar v. Sarafite* (1964) 376 U.S. 575, 589.)

"To establish good cause for a continuance [based on the absence of a witness], defendant had the burden of showing that he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven." (*People v. Howard* (1992) 1 Cal.4th 1132, 1171 (*Howard*).) In exercising its broad discretion in determining whether to grant or deny a motion for continuance in the midst of a trial, a trial court "must consider ' " 'not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.' " ' " (*People v. Doolin* (2009) 45 Cal.4th 390, 450 (*Doolin*).)

"A reviewing court considers the circumstances of each case and the reasons presented for the request to determine whether a trial court's denial of a continuance was

so arbitrary as to deny due process. [Citation.] Absent a showing of an abuse of discretion and prejudice, the trial court's denial does not warrant reversal." (*Doolin, supra,* 45 Cal.4th at p. 450; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 1037.)

We conclude the trial court acted within its discretion when denying Herrera's request for a continuance to present rebuttal expert testimony regarding strangulation.[13] There was no surprise regarding the scope of Rodriguez's testimony. The prosecutor's in limine motion referenced the general aspects of Rodriguez's proposed testimony on strangulation as well as the specific strangulation symptoms Janeth had reported. In addition, the trial court informed defense counsel that the prosecutor "obviously" could solicit Rodriguez's opinions using hypothetical questions grounded in the trial evidence. Despite knowing this, defense counsel apparently did not explore any case-specific circumstances with his expert before Rodriguez testified.

Further, the record supports the trial court's finding regarding defense counsel's failure to secure the attendance of his expert, Dr. Halimi, or a substitute expert to testify on April 19. The trial court made it clear to defense counsel on April 8 that any defense expert had to be available to testify either on April 19 or the morning of April 20. Defense counsel responded by saying he would ensure his expert was available on the afternoon of April 19. But defense counsel did not follow through on his promise. Instead, on April 18, defense counsel reported that his expert was not available on April 19, and counsel did not know when his expert would be available to testify. When

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[13] We reject the Attorney General's argument that Herrera forfeited the constitutional component of his claim of error. (*People v. Garcia* (2011) 52 Cal.4th 706, 755, fn. 27.) Nevertheless, we are not persuaded by Herrera's argument that we should review his claim using a de novo standard because he raises constitutional arguments attendant to the denial of his continuance request. Herrera does not cite a case that directly supports his contention. The California Supreme Court regularly employs the abuse of discretion standard when reviewing claims regarding the denial of a continuance that also assert a violation of constitutional protections. (See, e.g., *Howard, supra,* 1 Cal.4th at pp. 1171–1172; *People v. Samayoa* (1997) 15 Cal.4th 795, 840–841; see also *Doolin, supra,* 45 Cal.4th at pp. 450–451; *Mungia, supra,* 44 Cal.4th at pp. 1117–1119.)

making his continuance request the next day, defense counsel said his expert was not available for the rest of the week and could not testify until April 25. The record makes clear that defense counsel had ample notice of both the potential scope of the prosecution's expert testimony and the date on which the defense expert had to be present to testify.

Defense counsel's offer of proof in support of the continuance also was equivocal and described testimony that was cumulative of evidence elicited during Rodriguez's direct and cross-examination. Defense counsel said only that Dr. Halimi "would potentially testify to different percentages of cases that he sees" as an emergency doctor wherein there is strangulation with no visible injuries. The trial court appropriately regarded this proposed testimony as having been covered during Rodriguez's testimony and not providing any additional relevant evidence.

Finally, it is undisputed that the continuance would have burdened the jury and the trial court. The court would have had to replace a juror if the case was continued to April 25, and the prosecutor was unavailable after Friday, April 22.

For these reasons, we perceive no abuse of discretion in the trial court's denial of Herrera's midtrial request for a continuance and no violation of Herrera's constitutional rights.

C. *Ineffective Assistance of Counsel*

Herrera argues that his defense counsel rendered constitutionally ineffective assistance by failing to take additional steps to learn the intended scope of Rodriguez's expert testimony and by failing to arrange for rebuttal testimony by an available expert.[14] Herrera contends that defense counsel's failings amounted to deficient performance and prejudiced him.

[14] Herrera raises a similar claim in his accompanying supplemental petition for habeas corpus (H046532). We have issued an order to show cause on his ineffective assistance of counsel claim raised in that petition.

1. Analysis

To prove that his defense counsel was constitutionally ineffective, Herrera must establish both that counsel's performance was deficient and that he suffered prejudice as a result of counsel's error. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) Herrera bears the burden of demonstrating by a preponderance of the evidence that his counsel's performance fell below an objective standard of reasonableness. (*In re Thomas* (2006) 37 Cal.4th 1249, 1257.) "It is particularly difficult to prevail on an appellate claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) To satisfy the prejudice element of his claim, Herrera must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been more favorable to [him], i.e., a probability sufficient to undermine confidence in the outcome." (*In re Ross* (1995) 10 Cal.4th 184, 201.) We can reject Herrera's claim if he fails to establish either element of the *Strickland* standard. (See *Strickland*, at p. 687; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1008, disapproved on another ground in *Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.)

We need not decide here whether defense counsel's failure to scrutinize further Rodriguez's proposed testimony or ensure the availability of a rebuttal expert amounts to deficient performance, because Herrera has not demonstrated that he was prejudiced by defense counsel's alleged inaction. The appellate record does not establish what more defense counsel would have been able to learn about Rodriguez's impending testimony—beyond what the prosecutor said in his in limine motion and in court—if counsel had spoken to the prosecutor or taken some other unspecified action in this regard. Having

already consulted with Rodriguez and disclosed his notes of that conversation to defense counsel, the prosecutor said—prior to the week-long recess—that he did not anticipate meeting with Rodriguez to preview "every question" before she testified. There is no information in the appellate record establishing what, if anything, defense counsel would have uncovered if he had, as Herrera suggests, "taken additional steps to ensure he knew the contents of the prosecution expert testimony." Without proof about what defense counsel could have learned prior to Rodriguez's testimony, we cannot ascertain how the result of the trial would have been different but for counsel's alleged failure to do more than he did.

Similarly, if we assume that a reasonably diligent defense counsel could have "lined up another expert upon learning his chosen expert was unavailable," the appellate record does not demonstrate specifically what that substitute expert would have said. As discussed above, defense counsel proffered the expert testimony of Dr. Halimi solely on the subject of the "different percentages of cases" in which there was strangulation with no visible injuries, based on Dr. Halimi's experience.

If a substitute expert would have simply testified in accord with defense counsel's vague offer of proof regarding the percentage of cases with visible injuries, we do not discern any prejudice to Herrera from defense counsel's failure to present the substitute expert's testimony. Such nonspecific testimony would have been cumulative of other trial evidence. Given the totality of Rodriguez's expert testimony on the subject of visible injuries, Herrera has not shown a reasonable probability that the result of his trial would have been more favorable if another available expert had testified in accord with defense counsel's limited offer of proof.

When raised on appeal, ineffective assistance must be established "based upon the four corners of the record." (*Cunningham, supra,* 25 Cal.4th at p. 1003.) Prejudice must be proved "as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel." (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

Because the appellate record does not include the substance of any additional testimony that could have been marshaled if defense counsel had pursued a substitute expert, we conclude that Herrera has failed to demonstrate prejudice. (See *People v. Bolin* (1998) 18 Cal.4th 297, 334 ["The record does not establish defense experts would have provided exculpatory evidence if called, and we decline to speculate in that regard as well."].) For these reasons, we reject Herrera's appellate claim of ineffective assistance of counsel.

D. *Prior Inconsistent Statements*

In his next claim, Herrera contends that the trial court erred by admitting evidence of Janeth's statement to Officer Yates on the night of the incident that Herrera had his hand on her throat for 10 seconds. Herrera argues that Janeth's prior statement was not admissible under Evidence Code section 1235 because it was not inconsistent with her trial testimony. Herrera asserts he was prejudiced by the admission of Janeth's statement because the length of the strangulation was critical in light of Rodriguez's expert testimony that it would take 10 seconds of force to cause a loss of consciousness.

The Attorney General argues that Herrera's claim is forfeited because defense counsel objected on the ground that the prior statement was unreliable under Evidence Code section 352, not that Janeth's prior statement and testimony were consistent. The Attorney General argues further that the testimony and prior statement were inconsistent and, regardless, Herrera cannot show prejudice from any erroneous admission because independent evidence proved that the strangulation was likely to result in great bodily injury.

1. Background

Janeth testified that Herrera had his hand around her neck for "probably, like, five seconds." Janeth testified further that it took Herrera "like, five seconds" to let go; "It was all fast." Following up on this testimony, the prosecutor asked: "And, lastly, [Janeth], you mentioned today that the defendant, Mr. Herrera, while you were on the bed, had his hand around your neck for approximately five seconds. Didn't you tell

officers on the night of the incident that it was ten seconds?" Janeth responded, "It could have been longer. It felt pretty fast."[15]

The prosecutor subsequently sought to introduce Janeth's statement to Officer Yates about the ten-second time frame as a prior inconsistent statement. Defense counsel objected arguing that, because Yates made mistakes in his reporting on the incident and did not fully complete a supplemental domestic violence form, Yates's testimony was not "reliable enough under [an Evidence Code section] 352 analysis to come in as a prior inconsistent statement."

The trial court admitted the testimony, ruling that "to the extent [Yates] would be testifying that [Janeth] told him that the length of the choke was about ten seconds, that would be inconsistent with her testimony on direct, which I believe she indicated was about five seconds. And she referenced that as a relatively short -- five seconds or short. And so the Court will allow it in as a prior inconsistent statement."

Officer Yates testified that on the evening of the September 11, 2014 incident Janeth told him that Herrera had his hand on her throat area for approximately 10 seconds.

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[15] Defense counsel did not object to this question and answer. Earlier, however, during direct testimony about Janeth's prior statements to police, defense counsel objected and asked for a bench conference (which was not reported). After the prosecutor completed his direct examination, the trial court and parties recounted their sidebar discussion. Defense counsel argued that the prosecutor's mode of questioning was improper because Janeth had not testified inconsistently with her prior statements. Counsel explained, "My read of all [of Janeth's] testimony is that she hasn't been inconsistent -- clearly inconsistent with anything in the police report. There are minor details of potential arguable inconsistencies. But, for the most part, she's been completely consistent." The trial court responded that, "in certain limited areas," Janeth's testimony was different from her prior statements to the police and the weight of her inconsistent statements was an issue for the jury to decide.

2. Analysis

Turning first to forfeiture, defense counsel objected to Officer Yates's testimony about Janeth's prior statement only on the ground of unreliability "under [an Evidence Code section] 352 analysis." Although defense counsel had noted earlier during Janeth's direct examination that her testimony was not "clearly inconsistent with anything in the police report" and included only "minor details of potential arguable inconsistencies," defense counsel did not reference this earlier assertion or make further comment about any ostensible consistency between Janeth's testimony and her prior statement when he objected to Yates's testimony. Thus, Herrera's appellate claim that the trial court erred when it admitted Janeth's statement to Yates as a prior inconsistent statement is forfeited. (*People v. Homick* (2012) 55 Cal.4th 816, 858–859 (*Homick*); Evid. Code, § 353.)

In any event, Herrera's claim lacks merit. "A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770."[16] (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219 (*Johnson*).) "The 'fundamental requirement' of [Evidence Code] section 1235 is that the statement in fact be inconsistent with the witness's trial testimony." (*Ibid*.) Evidence Code section 1235 "does not require an express contradiction between the testimony and the prior statement, [although] it does require inconsistency in effect . . . ." (*In re Bell* (2017) 2 Cal.5th 1300, 1307.) We review a trial court's admission of a prior inconsistent statement for abuse of discretion. (*Homick*, *supra*, 55 Cal.4th at p. 859.)

[16] Evidence Code Section 1235 provides, "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his [or her] testimony at the hearing and is offered in compliance with [Evidence Code] Section 770." Evidence Code section 770 precludes admission of a prior inconsistent statement unless the witness is (1) confronted with the statement and afforded an opportunity to explain or deny it and (2) has not been excused from giving further testimony at the proceeding.

Janeth's trial testimony about the duration of Herrera's grasp on her neck was inconsistent with her prior statement to Officer Yates. Janeth said twice at trial that the strangulation lasted "like, five seconds." She also testified that the strangulation "was all fast." When confronted with her prior statement, Janeth acknowledged that the strangulation "could have been longer." She did not, however, explicitly retract her prior testimony. Moreover, she reiterated that the strangulation "felt pretty fast."

We do not agree with Herrera's contention that Janeth's testimony was ambiguous rather than inconsistent. Although the duration of the strangulation was relatively brief in both versions that Janeth recounted, the duration Janeth stated at trial was half as long as that she reported on the date of the incident. In addition, Janeth twice mentioned the rapidity of Herrera's action during her trial testimony, which reinforced the shorter, five-second version of the strangulation. Thus, Janeth's trial testimony was materially inconsistent with her prior statement to Officer Yates.

Herrera's reliance on *People v. Johnson* is unavailing because there—in contrast to this case—the witness's "somewhat ambiguous" testimony and "momentary expression of uncertainty" at trial was "essentially to the same effect as her prior testimony." (*Johnson*, *supra*, 3 Cal.4th at p. 1220.) Janeth's testimony was not "to the same effect" as her prior statement.

Herrera's argument also is not bolstered by *People v. Arias* (1996) 13 Cal.4th 92, because in *Arias* all but one of the differences in the witness's prior statements and testimony were deemed insignificant. (*Id*. at pp. 152–153.) Here, Janeth's testimony about the duration of the strangulation was not "largely consistent" with her prior statement to Officer Yates. (*Id*. at p. 153.) In addition, as explained further below, the details of Janeth's account of the strangulation were important to the charge of assault with force likely to produce great bodily injury. Yates's testimony therefore was material. Accordingly, we discern no abuse of discretion in the trial court's admission of Janeth's prior statement.

E. *Sufficiency of the Evidence for Count 2*

We now turn to the charge of assault with force likely to produce great bodily injury, count 2. (§ 245, subd. (a)(4).) The prosecution relied on the evidence of the neck-grabbing incident that occurred on the morning of September 11 to argue that Herrera had committed count 2. Herrera contends that the prosecution's proof for the "force likely to produce great bodily injury" element of this crime was insufficient because it rested on Janeth's testimony concerning the five- to ten-second strangulation that did not produce visible injury. Herrera asserts that Janeth's "testimony about the duration of the choking was an 'isolated bit of evidence' which was not substantial in light of the other facts."[17]

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318.) " 'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Powell* (2018) 5 Cal.5th 921, 944.) A reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "[A]n appellate court may not substitute its judgment for that of the jury. If the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

"Any person who commits an assault upon the person of another by any means of force likely to produce great bodily injury shall be punished by imprisonment." (§ 245,

[17] At trial, Herrera made a motion under section 1118.1 for a judgment of acquittal on the assault count. The trial court denied the motion.

subd. (a)(4).) "[W]hether the force used by the defendant was likely to produce great bodily injury is a question for the trier of fact to decide." (*People v. Sargent* (1999) 19 Cal.4th 1206, 1221.) " 'Likely means probable or . . . more probable than not.' " (*People v. Russell* (2005) 129 Cal.App.4th 776, 787.) "Great bodily injury is bodily injury which is significant or substantial, not insignificant, trivial or moderate." (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1066.) "[B]ecause the statute focuses on . . . force *likely* to produce great bodily injury, whether the victim in fact suffers any harm is immaterial." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.)

"While it is true that 'when the evidence shows that a blow has been struck or a physical injury actually inflicted, the nature and extent of the injury is a relevant and often controlling factor in determining whether the force used was of a felonious character' [citations], an injury is not an element of the crime, and the extent of any injury is not determinative. '. . . The issue, therefore, is not whether serious injury was caused, but whether the force used was such as would be likely to cause it.' " (*People v. Covino* (1980) 100 Cal.App.3d 660, 667 (*Covino*).) Whether a defendant's use of his hands "would be likely to cause great bodily injury is to be determined by the force of the impact, the manner in which [the hands were] used and the circumstances under which the force was applied." (*People v. McDaniel* (2008) 159 Cal.App.4th 736, 748–749.)

In light of the relevant case law, the prosecution's evidence here was sufficient to support the jury's guilty verdict for assault by means of force likely to produce great bodily injury. In particular, the prosecution presented evidence that Herrera strangled Janeth for five to 10 seconds, during which time he pushed her down and applied pressure to both sides of her neck with a "pretty strong" grip. Janeth had difficulty breathing and speaking during the strangulation and made a "gargling noise." For two days after the incident, she had a sore neck and difficulty turning it.

In addition, Rodriguez testified that a person's jugular veins and carotid arteries can be occluded with 4.4 and 11 pounds of pressure, respectively, and occlusion for 10

seconds can cause a loss of consciousness. Rodriguez testified further that between 11 and 33 pounds of pressure would damage the structures of the neck and cause pain, swelling, and difficulty breathing.

The evidence in this case is not like that in *People v. Duke* (1985) 174 Cal.App.3d 296. In *Duke*, the Court of Appeal concluded that the defendant's act of "momentarily" placing the victim in a headlock did not support a finding that the defendant used force likely to produce great bodily injury. (*Id*. at p. 303.) The court explained that "[t]he headlock made [the victim] feel 'choked' but did not cut off her breathing. She could still scream, and she did get away. The victim did not describe an attempt to choke or strangle her." (*Id*. at p. 302.) In contrast to the facts of *Duke*, Herrera's attack on Janeth involved the use of much greater force and resulted in her having difficulty breathing and speaking. This evidence was sufficient to support Herrera's conviction for count 2. (See *Covino*, *supra*, 100 Cal.App.3d at pp. 664–665, 667–668.)

Based on the entire trial record, we conclude that there is sufficient evidence from which a reasonable trier of fact could find beyond a reasonable doubt that the force Herrera used on Janeth constituted force likely to produce great bodily injury for assault as charged in count 2.

F. *Cumulative Error*

Herrera contends that the cumulative effect of prejudice from the claimed errors in his trial requires reversal. Because we find no error, there is no prejudice to cumulate.

## III. DISPOSITION

The judgment is affirmed.

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DANNER, J.

WE CONCUR:

_____
GREENWOOD, P.J.

_____
GROVER, J.

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